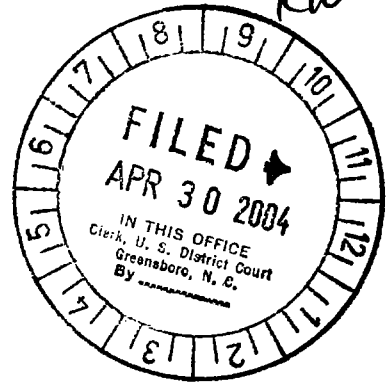


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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



DAVID SOSA

Plaintiff,

v.

ADVANCE AUTO PARTS

Defendant.

1:03CV00587

MEMORANDUM OPINION

TILLEY, Chief Judge

This matter is before the Court on Defendant's Motion for Summary Judgment. [Doc. #14]. For the reasons set forth below, the Defendant's Motion will be GRANTED.

I.

The facts, in the light most favorable to the Plaintiff, are as follows: Plaintiff David Sosa, a Puerto Rican male, began working as a part-time salesperson for Defendant Advance Auto Parts ("Advance")¹ in the spring² of 1999. Mr. Sosa began working with Advance in Georgia but eventually asked to be transferred to

¹While Mr. Sosa named Advance Auto Parts in the Complaint, Mr. Sosa's employer was Advance Stores Company, Incorporated d/b/a Advance Auto Parts.

²According to the Complaint, Mr. Sosa began working for Advance in April of 1999. In his deposition, Mr. Sosa stated that he began work in or around May of 1999. (Sosa Dep. at 7.)

North Carolina. After working as the Assistant Manager in two stores within North Carolina, Mr. Sosa asked his Division Manager, Bill Dickerson, if he could be transferred to the store in Aberdeen, North Carolina where they needed a new Store Manager.

In December of 2001, Mr. Dickerson granted Mr. Sosa's request and transferred him out of the district. Mr. Sosa began his work in the Aberdeen store as one of two full-time Assistant Managers, with the knowledge that one of the two would be promoted to the available Manager position. Within a period of a few weeks, Mr. Sosa became the Store Manager for the Aberdeen store.

In January of 2002, Mr. Dickerson became the Division Manager of the District encompassing the Aberdeen store. Shortly afterwards, Mr. Dickerson had to speak with Mr. Sosa about a complaint raised by Mr. Sosa's Assistant Manager, Sandra Privette. Ms. Privette had missed work due to a sudden medical emergency on January 5, 2002. Although Ms. Privette's husband called Mr. Sosa on the morning of her absence, and in spite of a medical note explaining the absence, Mr. Sosa had issued her a disciplinary write-up. Ms. Privette called Mr. Dickerson to complain and Mr. Dickerson agreed that the write-up had been inappropriate under the circumstances.³

³Mr. Sosa complained that Mr. Dickerson told him on another occasion not to discipline Ms. Privette because she was a minority and because she was "too sensitive."

In response to Ms. Privette's complaint, Mr. Dickerson met with Mr. Sosa and explained his policy that new managers should not take written disciplinary action against their employees without first consulting him. Mr. Dickerson explained that this policy was in place to help him train new managers to make good management decisions. Mr. Sosa viewed this policy as depriving him of his managerial authority. He later complained that he did not have the authority to discipline his employees and that Mr. Dickerson did not take action when Mr. Sosa came to him with concerns.⁴ As a result, Mr. Sosa eventually felt as if he had no way to get his employees to follow company policies.

On January 25, 2002, Mr. Dickerson again spoke with Mr. Sosa about one of Mr. Sosa's management decisions. Mr. Sosa had been editing the time sheets of employees who claimed to have earned overtime hours. If an employee reported overtime which Mr. Sosa had not approved, he reviewed the employee's time sheets to try and determine if the employee had failed to clock out for a lunch he knew the employee had taken or if the employee had otherwise reported false hours. Using this method, Mr. Sosa subtracted 3.9 hours of overtime for one of his employees. The employee complained to Mr. Dickerson and Mr. Dickerson

⁴For example, Mr. Sosa reported concerns about employee Horrace Russell's inappropriate comments and attitude. Mr. Russell had been rude to an elderly customer and had referred to a mixed race couple in the store looking like a "zebra" together. He had also made a comment to Mr. Sosa that he was "tired of these damn Negroes trying to get something for free." Mr. Sosa believes that, although he expressed these concerns to Mr. Dickerson, Mr. Russell was never disciplined. However, Mr. Russell was fired on October 5, 2002 due to inappropriate behavior.

issued Mr. Sosa a verbal and written reprimand. Mr. Sosa signed the written copy of the reprimand but made a notation at the bottom that he was denied an attorney and that he thought the reprimand was discriminatory.

In June of 2002, Advance's Risk Services Manager, Joseph Styers, noticed that the Aberdeen store appeared on a list of stores who had failed to make deposits on time and/or stores which had cash or inventory shortages. Accordingly, on June 13, 2002, Mr. Styers sent auditor Dusty Marshall to the Aberdeen store to conduct a Loss Prevention Audit. The audit revealed problems with the Aberdeen store, specifically, problems with late deposits.

On July 26, 2002, Mr. Styers conducted a full audit of the Aberdeen store. The store received an unsatisfactory rating of 54 points out of a possible 100. Mr. Sosa does not deny all of the violations found in the full audit. Mr. Sosa denied some of the violations cited by Mr. Styers on the audit form, did not understand some of the violations, and blamed the rest of the violations on his inability to discipline his employees and make them do their jobs. (Sosa Dep. at 63-73.)

Mr. Styers, upon discovering that the audit results were not going to be good, telephoned Mr. Dickerson to have him present when the audit results were discussed with Mr. Sosa.⁵ Mr. Sosa suspected something was going on and called

⁵Mr. Styers stated in his affidavit that he went over the audit results with Mr. Sosa in the presence of Mr. Dickerson. (Styers Aff. at 3-4.) Mr. Sosa stated in his deposition that neither man ever discussed the results of the audit with him. (Sosa Dep. at 108.)

Advance's competitor, Auto Zone, from the telephone at the Aberdeen store to ask if a job they had offered months before was still available. Mr. Styers was nearby at the time and heard Mr. Sosa's telephone conversation. He informed Mr. Dickerson that Mr. Sosa was asking about a job with the competition and Mr. Dickerson immediately approached Mr. Sosa and fired him.

Mr. Sosa objects to being terminated for failing the audit not only because he felt that he did not have the proper authority to discipline his employees, but because another Manager who failed his audit was not terminated. Mr. Jerome Bennett also received an unsatisfactory score on an audit in 2002 but, instead of being terminated, was allowed the opportunity to fix the mistakes. Advance contends that the difference between Mr. Sosa and Mr. Bennett is that Mr. Bennett had a long history of good performance with the company⁶ and that Mr. Bennett reacted to the news of the audit in a more professional manner. Mr. Bennett's continued employment was conditioned on his correcting the problems found in the audit.

Mr. Sosa contacted Alan Maxwell, Advance's Regional Human Resources Manager, and complained that he had been wrongfully terminated. The two agreed to meet to discuss the situation on August 6, 2002. George Paugh, Regional Vice President and Mr. Dickerson's direct supervisor, was also present at the meeting.

⁶Advance attached positive performance reviews for Mr. Bennett dating back more than ten years.

At that time, Mr. Paugh offered to reinstate Mr. Sosa for a trial period while Mr. Sosa tried to correct the problems noted in the audit report. Mr. Sosa stated that he was not willing to take the position as long as Mr. Dickerson was the Regional Manager. Mr. Maxwell and Mr. Paugh assured Mr. Sosa that any disciplinary action taken against him by Mr. Dickerson would have to be approved by the regional office. However, Mr. Sosa continued to request that either he or Mr. Dickerson be transferred to another store. Mr. Maxwell and Mr. Paugh agreed to look into the possibility of transfer and meet with Mr. Sosa again on August 15, 2002.

At the August 15 meeting, Mr. Maxwell and Mr. Paugh informed Mr. Sosa that a transfer would not be possible. They again offered Mr. Sosa the opportunity to work at the Aberdeen store for a 60-day trial period, guaranteeing him that he would have the power to discipline his employees and that Mr. Dickerson would not retaliate against him. Mr. Sosa declined the offer because he was unwilling to return to work for Mr. Dickerson and because he had already accepted a position with AutoZone. Although the two positions offered comparable salaries and benefits, Mr. Sosa had to start as a management trainee at AutoZone and had to drive an hour to work each way.

Mr. Sosa's replacement at the Aberdeen store was Johnny Byrd. Mr. Sosa contends that Mr. Byrd, who is not Hispanic, was treated more favorably. Mr. Sosa heard that Advance paid hotel costs for Mr. Byrd because he did not live

close to the store. Further, Mr. Sosa believes that Mr. Byrd was not disciplined even though he blatantly violated company policy. For example, Mr. Sosa stated that Mr. Byrd left equipment outside overnight and was paying employees out of the cash register in order to avoid reporting their overtime. Mr. Sosa contends that Advance's failure to fire or discipline Mr. Byrd is evidence of Advance's discrimination towards Hispanics. However, Mr. Sosa does not know if Mr. Byrd was disciplined for leaving the equipment outside. Mr. Byrd was fired on September 24, 2002 for failing to report overtime hours.

Mr. Sosa filed a pro se Complaint on June 23, 2003 after timely completing all required administrative procedures.⁷ The handwritten Complaint contains allegations of unequal treatment and discriminatory termination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). Specifically, Mr. Sosa alleged that Mr. Dickerson harassed him and deprived him of his managerial authority but still held him accountable for the actions of store employees. He also alleged that Advance's stated reason for his termination was improper because other managers who failed audits were not fired.⁸

⁷An EEOC right to sue letter was mailed to Mr. Sosa on March 26, 2003.

⁸The Complaint also arguably includes a retaliation claim, stating that Mr. Sosa "[f]elt discriminated against after a discrimination complaint made to Bill Dickerson went untaken care of." However, Mr. Sosa's deposition testimony reveals that he only intended to add to his complaints about Mr. Dickerson's failure to promptly address various work-related concerns that Mr. Sosa raised. Further, in the area designated for listing "acts complained of" in his Complaint, Mr. Sosa only checked the lines beside "Termination of my employment" and "Other." In

Advance filed a Motion for Summary Judgment on January 29, 2004. Mr. Sosa did not respond.

II.

Summary judgment is appropriately granted against a party when that party has the burden of proof on a particular claim and is unable to make a showing -- by affidavit, deposition testimony, answers to interrogatories, or admissions on file -- of specific facts which would be (1) admissible at trial and (2) sufficient to support a jury verdict on each element of that claim. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In considering the motion, the court must consider the evidence, and any reasonable inferences to be drawn from the evidence, in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 597-88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Summary judgment is not appropriate if factual issues "may reasonably be resolved in favor of either party," because those issues may only properly be resolved by a finder of fact. Anderson, 477 U.S. at 250, 106 S.Ct. at 2511. If, however, there can be but one reasonable interpretation of the facts relating to a claim, the claim can be determined as a matter of law and summary judgment may be appropriate. Fed. R. Civ. P. 56(e).

explaining the latter claim, he wrote "unequal treatment based on discrimination."

Advance filed its Motion for Summary Judgment on January 29, 2004. Mr. Sosa did not respond within thirty days as required by Local Rule 56.1(d), despite receiving a letter explaining the effect of his failure to respond.⁹ Mr. Sosa still has not filed any response to Defendant's Motion for Summary Judgment. As such, the motion will be treated as uncontested. Local Rule 56.1(d).

An uncontested motion for summary judgment is not automatically granted. Campbell v. Hewitt, Coleman & Assocs., Inc., 21 F.3d 52, 55 (4th Cir. 1994); Custer v. Pan Am. Life Ins. Co., 12 F.3d 410, 416 (4th Cir. 1993). While a party's failure to respond to a summary judgment motion may leave the facts established by the motion uncontroverted, the moving party must still show that the facts entitle him to judgment as a matter of law. Custer, 12 F.3d 410 at 416. Because Mr. Sosa failed to provide any facts from which a reasonable jury could find in his favor, Advance's motion for summary judgment is granted.

III.

Title VII makes it "an unlawful employment practice for an employer . . . to discharge . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . national origin." 42 U.S.C.A. § 2000e-2(a)(1). A plaintiff may establish a Title VII discrimination claim in one of two ways: (1) by demonstrating,

⁹The Clerk of this Court mailed a letter, dated March 29, 2004, to Mr. Sosa's home address.

through direct or circumstantial evidence, that discrimination motivated the employer's adverse employment decision, or (2) by using the judicially created proof scheme established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 284-85 (4th Cir. 2004).

Mr. Sosa has provided no direct evidence that he was discharged because of his national origin. To the contrary, he admits in his deposition that nobody at Advance either made comments reflecting negatively on his Hispanic status or otherwise suggested to him that the reason for his treatment was that he was Hispanic. He stated in his deposition that the sole basis for his discrimination claim is that other, non-Hispanic, people were treated more favorably. (Sosa Dep. at 157-58.)

Because Mr. Sosa cannot establish discrimination directly, his Title VII discharge claim must proceed under the judicially created proof scheme established in McDonnell Douglas, 411 U.S. 792. Under the McDonnell Douglas test, if a plaintiff can establish a prima facie case of discrimination, a presumption of discrimination is created. However, if the employer articulates a legitimate nondiscriminatory reason for terminating the plaintiff, the presumption of discrimination drops from the case and the plaintiff bears the burden of demonstrating that the defendant's explanation is pretextual. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981); Runnenbaum v. NationsBank of

Md., 123 F.3d 156, 164 (4th Cir. 1997) (en banc). The prima facie case, when combined with a rejection of the defendant's proffered reason for termination, may permit the trier-of-fact to infer the ultimate fact of intentional discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993). The plaintiff at all times bears the ultimate burden of proving discrimination. See Runnebaum, 123 F.3d at 164.

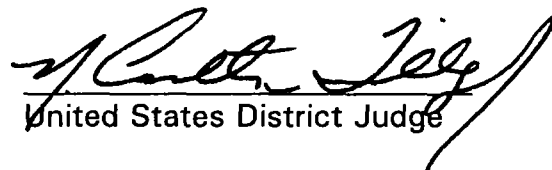
Because Mr. Sosa cannot create a prima facie case of discrimination, he cannot survive summary judgment. To establish a prima facie case of racial discrimination, the plaintiff must show that: (1) he is a member of a protected class; (2) his job performance was satisfactory; (3) he was fired in spite of his satisfactory performance; and (4) the position was filled by a similarly qualified applicant outside the protected class. Brinkley v. Harbour Recreation Club, 180 F.3d 598, 608 (4th Cir. 1999). Therefore, to avoid summary judgment, Mr. Sosa must point to facts on the record that are sufficient to create a genuine issue of material fact as to each element that would be required as part of his prima facie case.

Mr. Sosa has failed to create a genuine issue of fact that he was performing his job satisfactorily. To the contrary, Mr. Sosa admits that he changed his employees' time sheets and that his store received an unsatisfactory score on the full audit. He also admits to some of the violations found in the audit. Mr. Sosa does not deny that he was accountable for the performance of his employees,

although he claims that he should not have been accountable because he could not properly discipline them. Finally, he admits to calling a competitor while at work in order to inquire about a job.

In sum, Mr. Sosa has not put forth any evidence, in the way of performance reviews or other documentation, that he was performing satisfactorily when he was terminated. Therefore, Advance's Motion for Summary Judgment will be GRANTED.

This the 30 day of April, 2004.


United States District Judge